In The United States Circuit Court of Appeals for the Ninth Circuit

NORTH PACIFIC STEAMSHIP CO., A CORPORATION, CLAIMANT OF THE STEAMSHIP YUCATAN,

Appellant,

vs.

THE STATE OF OREGON AND MULTNOMAH COUNTY,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.
HONORABLE R. S. BEAN, JUDGE.

Brief of Appellant

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GREENBAY PRINTING CO.

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STATEMENT OF THE CASE.

This suit was brought by the State of Oregon, libelant, for damages claimed to have been done to a piano on the Steamship Boston and certain damage to the Boston itself by the Steamship Yucatan in the Willamette River at Portland, Oregon, at 12 o'clock noon, March 3, 1914, the Boston being under lease to the State of Oregon as a training ship for the naval militia.

No findings of fact or conclusions of law were made or filed by the court below.

The decree allowed the claim of the State of Oregon for damage to the piano in the sum of seven hundred dollars ($700), and for damage to the Boston in the sum of three hundred and fifty-six dollars ($356), making a total of one thousand and fifty-six dollars ($1056).

After the decree was rendered, the claimant, the North Pacific Steamship Company, filed a motion that the court make and file findings of fact on certain points. (Apostles, p. 31.) This was done with the view that findings of fact if made by the court below would entitle the claimant to a decree under the law applicable to the facts, it not being clear to the claimant under the facts and under the law on what ground the court below relieved the County of Multnomah for negligence in not opening the bridge, and relieved the Boston for negligence in lying in the fairway with the guns projecting.

SPECIFICATIONS OF ERROR IN THE DECREE.

In this appeal the claimant and appellant, the North Pacific Steamship Company, assigns error in the decree in granting the State of Oregon a decree in the sum of $1056, and $132.94 costs and disbursements, or any sum against the Yucatan or the claimant or its stipulators.

And in dismissing the cross libel filed by the claimant against Multnomah County.

And in granting to the said Multnomah County a decree against the North Pacific Steamship Company and its stipulator in the sum of $139.20, or any sum for the costs as attached.

And in not granting to the claimant a decree that it recover of and from the State of Oregon and the County of Multnomah the amount claimed for damages to the Yucatan as pleaded and proven, and the costs and disbursements of claimant incurred herein.

In the absence of findings it is difficult to present assignments of error; nevertheless the attempt has been made, and such assignments of error are found on pages 37-39 of the printed record.

QUESTIONS INVOLVED UNDER THE PLEADINGS.

The second amended libel of the State of Oregon sets forth one allegation of negligence on the part of the Yucatan, to-wit: "That on so moving the said Steamship Yucatan her master, Captain A. C. Poulson, was acting contrary to law, in that he was not a licensed pilot for said river and did not have a licensed pilot aboard said vessel."

It is contended that no other facts are alleged. It is true that the libel says that by reason of carelessness and negligence and unlawful handling of said vessel, and without fault on the part of the Boston, etc., the Yucatan collided with the Boston, etc., and that the Boston's position was legally authorized by the United States engineer, and was also

authorized by the owners of upland on the east, but the claimant points out an absence of facts constituting negligence in the libel. (Apostles, p. 6.) It will be argued that under the law the absence of a licensed pilot is not negligence; that the facts govern, and in the event of the breach of the regulations it must appear that it was the breach of the regulations that caused the damage; that it was a breach of the statute and regulations on the part of libelant and Multnomah County both that caused the damage.

The cross libel of the claimant alleges that the County of Multnomah was responsible for the handling of the bridge, which is admitted by the County of Multnomah.

The cross libel of the claimant with regard to the piano and the damage to the Boston denies the negligence, and denies that the position in which the Boston was moored was authorized by the United States engineers, and will contend that there is no evidence that the engineers authorized her position in the fairway, but only authorized the placing of the dolphin; and further denies that owners of nearby property have any right to authorize the location of the Boston. The cross libel further sets forth that the City of Portland is a municipal corporation and has made the following regulations by ordinance regarding the harbor: "Vessels must not be anchored or moored within the fairway channel within the city limits, neither must they be moored or anchored within 400 feet of any bridge or ferry

line." It is further alleged that there were projecting from the starboard side of the Boston guns to the distance of some ten feet, and that said guns were easily movable.

It is further alleged in the cross libel that there is an ordinance of the City of Portland to the effect that the "master or person having charge or command of any vessel coming to or lying alongside of any wharf shall, both before and during such time as such vessel is moored or stationed at such wharf, have the anchors stowed, the jib boom in, the lower yards topped and braced sharp up, and all other projections stowed within the rail of said vessel."

This ordinance is also admitted.

It is further alleged in the cross libel that the piano was in the only place at which it could receive damage from the outside by the action of one of the guns; in other words, it was placed exactly where the breech of the gun, swinging on its trunnion, could crush the piano against a projection or angle in the skin of the Boston.

The claimant further alleges that it had no knowledge as to the terms of the lease held by the State of Oregon covering the Boston, but the lease was proven at the trial whereby the right of the State of Oregon to make a claim for the Boston was substantiated. The cross libel further shows that the bridges in the City of Portland are subject to the regulations of the Government of the United States and the rules and regulations of the Secretary of War, this regulation having been issued that

"in case the draw cannot be *immediately* operated on the prescribed signal, a red flag or ball by day and a red light by night shall be conspicuously displayed." It is admitted that the bridge did not open on signal and no red flag or red ball was displayed by the bridge.

The cross libel further alleges that the Yucatan signaled once and again for the draw, and the draw not opening, the master then sounded the danger signal, but because the river at that point is about 600 feet wide and the distance from the Broadway bridge to the Globe milling dock is a distance of approximately only 1300 feet, it was unwise for the Yucatan to let go of the line made fast to the Globe dock while the bridge was still shut. The distances are admitted by the answer of Multnomah County to the cross libel, but the County of Multnomah alleges that it was unwise for the Yucatan to stay fast to the Globe dock and on the contrary that it should have let go, and denies the bridge did not open for nineteen minutes after signal, but alleges it was opened fourteen minutes after the signal.

The cross libel of the claimant further (paragraph X, Apostles, p. 15) sets forth the fact showing how the cargo boom of the Yucatan was torn loose by the muzzle of the gun, whereby the cargo boom caught on the canopy of the launch in a cradle on the deck of the Boston, and claims that this damage was due to the gun projecting from the side of the Boston. The cross libel alleges (paragraph XIV,

Apostles, p. 17) that the Yucatan was in charge of a master who was thoroughly competent.

The cross libel of the claimant (paragraph XV, Apostles, p. 17) alleges that the damage to the libelant was caused by its negligence in leaving the Boston in the fairway and in leaving the guns projecting further in the fairway, whereby the gun caused the damage to the piano and to the Yucatan, and the cargo boom was torn loose by the gun and ripped the canopy on the launch. And further that the negligence of Multnomah County in not opening the draw and in putting in a tender or operator not familiar with bridges or electricity, by which the bridge was operated, and not familiar with the river and with the regulations covering the movements of boats and vessels, caused the accident.

The Yucatan claims damage in the sum of $1200.

The answer of the County of Multnomah to the cross libel, after admitting the allegation of the organization of the plaintiff and of Multnomah County, and that the latter operated the bridge, and after admitting the ordinances of the city above mentioned in regard to mooring in the fairway and the projection from the sides of the ships, denies knowledge as to the location of the piano, further admits the government regulation "that in case a draw cannot be immediately operated when the prescribed signal is given a red flag or ball by day or a red light by night shall be conspicuously displayed," and further claims that it is the duty of the person operating the bridge to cause the draw

to be opened without unreasonable delay with reference to the state of traffic, the construction of the draw or lift and the conditions existing.

The claimant contends that there was unreasonable delay, that the bridge could have been opened in one minute to three minutes, and that there was no traffic at the time to embarrass the bridge tender, as shown by their own testimony, and there were no conditions existing which prevented the opening of the bridge. It contends that the delay in opening the bridge was due to the ignorance of the bridge tender.

The County of Multnomah in answer to the cross libel (paragraph VI, Apostles, p. 21) admits that at the time of the second signal the draw did not lift or open, and is silent as to whether the bridge was opened when the danger signal was sounded or not, but admits that the bridge did not open in less than fourteen minutes after the first signal had been given, and also admits that no red flag or ball was displayed to indicate that the bridge would not open. And the said answer further denies that the Yucatan got under way to pass through the bridge at all within less than four minutes after the bridge began to open; in other words, the County of Multnomah admits the bridge did not open on signal given twice, and then in the same sentence "this respondent denies that immediately upon said bridge beginning to open or any less than four minutes thereafter the said Yucatan got under way to pass through said bridge." The respondent admits the distances here-

inbefore mentioned, and denies that it would have been unwise to let go of the line while the bridge was shut and denies any knowledge of all other allegations, and denies that the accident was caused in any manner by the failure of the bridge to open.

The Multnomah County answer denies any knowledge of what took place on the Boston, and in paragraph VIII of cross libel (Apostles, p. 22) denies that the master of the Yucatan was competent in any way to handle that ship. No evidence was introduced to support this denial in the face of the catain's evidence of his experience.

The County of Multnomah, the cross libelant, in the IX paragraph denies that damage was caused by the negligence of the county in not opening the draw or of putting in charge of the bridge a foreman not familiar with bridges or electricity, by which the bridge was operated, and not familiar with the river and regulations governing the movements of vessels, and denies that the damage was caused by any negligence whatever of the County of Multnomah, and denies that the bridge did not open promptly, and denies that the bridge tender or foreman was not familiar with the bridge or regulations or with the river or with the regulations governing the movements of boats or vessels thereon.

The answer of Multnomah County to the cross libel denies the alleged damage of $1200 to the Yucatan, and in paragraph XII further admits that the Yucatan had begun to make her turn when she sounded the first signal, and that shortly after the

first signal the Yucatan began to turn, and that the second signal was given only when she was about 20 degrees off the dock, which may or may not be true, but which we think is immaterial, that is, as to the exact number of degrees making the angle with her side to the dock, and further the answer alleges that traffic over the bridge was extremely heavy, being the hour of noon, whereas the testimony of the bridge tender was that there was very little traffic because it was noon. Further the Multnomah County answer alleges that the bridge had to be cleared of traffic before the draw could be opened, which, as above indicated, is not the testimony of the county's witnesses. And further, that in turning the vessel the captain should have caused the vessel to let go of the line and to get under way as soon as the bow of the vessel reached a point about 100 degrees off the dock, and further that Captain Poulson was not a pilot for the Willamette River or Portland harbor, and that there was no licensed pilot aboard. And further, that the master of the Yucatan was not familiar with the speed or the set of the current or the depth of the water or the character of the bottom of the Willamette River. The claimant, however, will contend from the evidence that the master of the Yucatan was accustomed to landing at the Globe dock frequently, and his testimony and that of the two local pilots shows that he was thoroughly familiar with all the local conditions.

The County of Multnomah further repeats that the captain had no license, was without his license for the Portland harbor, etc., and without knowledge of the local conditions, and that it took the Yucatan fifteen minutes before her bow was 100 degrees off the dock; and further that the bridge was already open for the Yucatan several minutes before the Yucatan, if she had let go of her stern line and got under way for the bridge, would have reached the bridge. In other words, the County of Multnomah says that if she had let go the bridge would have been open before she got there, whereas the accident happened because the bridge was not open, whereby the Yucatan was compelled to keep fast to the dock, and she kept fast to the dock to prevent crashing into the bridge. And the same paragraph sets forth that the Yucatan held to the dock until the bow had reached a point 150 degrees off the dock when she did in fact let go and make for said draw; that Captain Poulson was incompetent to handle the vessel and sounded the danger signal, and further that he was not familiar with the location of the Boston and that he was not competent to handle the Yucatan, and he steered the Yucatan in such a way that she collided with the gun on the Boston.

The claimant wishes to point out that under this answer of Multnomah County the claim is made that if the Yucatan had let go of the dock she would have got through the bridge in safety, and that she let go when she was 150 degrees off the dock instead of letting go when she was at about 90 or 100 degrees

off the dock. This claim might be reasonable if it were not for the fact that the evidence is conclusive on the point that the bridge did not open until after the danger signal.

The County of Multnomah further pleads that the Yucatan went through the bridge, which at the time was fully opened, and that the collision was caused by the neglect of the master of the Yucatan, and that the bridge was open for a period of seven minutes.

The claimant points out that the State of Oregon and the County of Multnomah rely entirely on the fact that the master of the Yucatan was without a Portland harbor pilot, and that his master's license was not endorsed for the Portland harbor, and that this constituted such a condition as to charge all of the expense to the Yucatan.

It is pointed out that as to the State of Oregon the Boston was breaking the ordinance of the City of Portland once in leaving the Boston in the fairway and again in placing the guns projecting from the sides, and further, that the County of Multnomah committed a breach of the statute and of the regulations of the War Department in not opening the bridge on signal and in not displaying a red ball or a red flag to indicate that the bridge would not open.

The claimant will further contend that the matter of the exact comparative location of the Yucatan and the dock at the time the signals were blown is immaterial, as this is a matter of judgment in

the hands of the master alone, and further, that in a crisis or in a dangerous situation the master can not be criticised for any order he gives or move that he makes in the way of protecting his ship against danger.

Photographs accompanying were introduced in the evidence. There is a map (p. 215 of the Apostles) introduced by the libelant. There was also a blue-print at the trial, being an enlargement of the map on page 215 of Apostles, which blue-print, however, was not introduced in evidence, the proctor for the libelant offering the enlargement in evidence (Apostles, pp. 42 to 44), but the court excluded it on the ground that it showed some divergence in details, and the matter was not pressed, the court saying (Apostles, p. 44): "You can mark that later. I understand this (referring to the enlargement) is simply an enlargement of the other plat and does not show the location of the Boston at all."

POINTS AND AUTHORITIES.

Liability of Multnomah County.

Suit in *personam* will lie.

Oregon City Nav. Co. v. Columbia Br. Co., 53 Fed. 551.

City of Boston v. Crowley, 38 Fed. 204.

Admiralty has jurisdiction.

Atlee v. Union Packet Co., 88 U. S. 398; 22 L. Ed. 620.

City held liable for failure to open draw.

Greenwood v. Westport, 60 Fed. 560; 53 Fed. 824.

Etheridge v. Philadelphia, 26 Fed. 43.

And for breach of statute regarding bridge.

City of Boston v. Crowley, 38 Fed. 204.

It is a misdemeanor to unreasonably delay the opening of a draw after reasonable signals shall have been given as provided by regulations.

Act of August 18, 1894, claimant's Exhibit 6, Ap. p. 226.

6 Fed. St. Ann. 793.

28 St. L. 362.

The regulations prescribe that engineer or operator shall promptly open the draw for sea-going vessels over 250 tons at any or all times, day or night.

Regulations of Secy. of War, claimant's Exh. 6, Ap. p. 229.

The bridge did not open for fourteen minutes after signal and displayed no warning flag or ball, and the Yucatan was over 1000 feet from the bridge.

Answer of Multnomah Co., Ap. p. 21.

There were no conditions or facts excusing the failure to open or create any exception to the statute and the regulations.

Testimony of Smith, operator and foreman, Ap. p. 186.

LIABILITY OF LIBELANT, STATE OF OREGON.

The burden rests on the libelant to show that the position of the Boston could not have caused the injury.

Penn. v. Troup, 19 Wallace; 86 U. S. 125; 22 L. Ed. 151.

Ord. City of Portland, claimant's Exh. 7, Sec. 2, Ap. p. 231.

Ord. City of Portland, claimant's Exh. 7, Sec. 6, Ap. p. 233.

The Boston, lying as she was in the narrowest part of the river, shut in by two bridges, is bound to take all precautions necessary, both under the statute and under the maritime law.

Act of March 3, 1899, Chapter 425, 6 & 15; 30 Stat. 1152.

The Georgia, 208 Fed. 643-646.

Regardless of the ordinances of the City of Portland, it is negligence on the part of the libelant to have allowed the Boston to be anchored in the fairway, as she was, between the bridges and in the narrow space.

The Skidmore v. City of St. Lawrence, 108 Fed. 972.

La Bourgogne, 86 Fed. 475.

In these citations fog caused the collision. In the cause at bar the failure to open the draw, a human agency, caused the collision, which would not have occurred if the Boston had not been in a dangerous place, or if, being in a dangerous place, she

had taken in her guns. No damage occurred other than that caused by the gun's position.

The State of Oregon was negligent in allowing the gun on the Boston to project beyond the rail.

The Clover, 5 Fed. Cas. 2908.
The Phoenix, 19 Fed. Cas. 11101.
Price v. The Sontag, 40 Fed. 174.
Hamman v. The Industry, 27 Fed. 767.
McGuire v. Ft. Lee, 31 Fed. 571.

As to the Comparative Liability of the Parties.

When a party is in actual violation of a statutory rule it is a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster. In such a case the burden rests upon such party of showing not merely that its fault might not have been one of the causes or that it probably was not, but that it could not have been.

Yan Tse Ins. Assn. v. Furness, 215 Fed. 863.
The Vancouver, 2 Sawyer, 385.
Pennsylvania v. Troup, supra.

The County of Multnomah was in actual violation of a statutory rule in not opening the bridge or in not displaying a red flag or a red ball to indicate that the bridge would not open and has not shown that this breach of the statute could not have been a cause of the accident.

The Boston was lying in the fairway with guns projecting and the libelant has not shown that this

breach of the ordinances of the City of Portland could not have been one of the causes of the accident.

The absence of a person on the ship holding a local harbor license is neither a crime nor a misdemeanor, although a violation of a statutory rule, and the claimant has shown that this fault could not have been one of the causes of the accident, in which case it may be dismissed from consideration.

Penn. v. Troup, 86 U. S.; 19 Wall. 125-138; 23 L. Ed. 151.

The absence of a local pilot is not negligence.

N. Y. v. Calderwood, 60 U. S.; 19 Howard, 241; 15 L. Ed. 613.

The Charlotte, 51 Fed. 459.

The absence of a lookout is not material where the presence of one would not have availed to prevent a collision.

The Bluejacket, 144 U. S. 371; 30 L. Ed. 477, 478.

Nor is the absence of a licensed engineer negligence.

The Vancouver, 2 Sawy. 383.

As to the number of degrees of the angle of the Yucatan to the dock when she let go her line, any act of a mariner when placed in a position of danger without previous negligence on his part is one in *extremis* and is not a fault.

The Vancouver, 2 Sawy. 385.

Greenwood v. Town of Westport, 60 Fed. 565, 566.

Prinz Oskar, 216 Fed. 237.
City of Paris, 9 Wall. 638.

The master of the Yucatan is not blamed by any one at the trial. Neither libelant's witnesses nor Multnomah County's witnesses criticise the master of the Yucatan. The only charge of negligence against him is in the answer of Multnomah County as to the number of degrees of the ship to the dock, not supported by the evidence.

Under the most unfavorable construction possible of the evidence and admitted facts the claimant contends that damages should be divided.

Atlee v. Union Packet Co., 88 U. S. 389-398; 22 L. Ed. 621.

ARGUMENT.

As to the Bridge.

It has appeared to the claimant that the burden is on the bridge and on the Boston to pay the entire damage to the Yucatan. The libelant in suing has based its claim on the absence of a person having a local license on the Yucatan. In so doing it apparently overlooked the fact that the principle of law invoked against the Yucatan applies more strongly to the breach of the ordinance by the Boston in lying in the fairway and in leaving projections ten feet beyond the rail, to say nothing of the general law on this aspect of the case, and likewise applies more strongly to the operators of the bridge than to the Yucatan.

The County of Multnomah in its pleadings charges that the Yucatan should "have caused such vessel to let go of said stern line and to get under way for said draw as soon as the bow of said vessel reached a point about 100 degrees off of said dock" (Ap., p. 26). In the testimony, however, the County of Multnomah abandoned this position and endeavored to show that the Yucatan was to blame in not keeping fast to the dock in all events, so that the Yucatan might have swung into the Boston gently. This effort was first made through the witness Hilton. (Ap., pp. 144, 145.) In the cross examination of Captain Poulson the district attorney endeavors to show that if the Yucatan had held to the line she would have swung without striking the Boston, to which, however, the captain did not agree, and apparently believing that this position was correct, the district attorney recalled Hilton to show the distances with the idea that the distances would have allowed the Yucatan, holding fast to the line, to have struck the dock without striking the Boston. The Boston is a ship of about 3500 tons gross. The effort was made on page 174 of the record to show in a general way the distances by Mr. Hilton, which resulted in the statement of the proctor for the libelant that the Yucatan would have struck the Boston thirty-two feet aft of the forecastle if she had held to the dock. This claim was promptly abandoned when these conditions became apparent, but on cross examination the witness Hilton, after being repeatedly asked, had to admit (Ap., p. 177) that the Yuca-

tan would have hit the gun on his own figures if the Yucatan had been fast to the dock. Attention is called to the extreme reluctance of this witness to admit the conclusion from his own figures.

No other charge of negligence against the Yucatan is made by the County of Multnomah, no other facts are alleged. There are two answers to these charges.

One is that if the bridge had been opened no question would have arisen, as the Yucatan would have gone through the draw as she ordinarily does. The other is that no question of negligence is pleaded as to the captain's handling of the vessel except as to the number of degrees at which his ship lay to the dock when he let go the line. Up to that point he is not criticised, and after that point he is not criticised. It is apparent to any mind that no individual on the bridge of a ship can tell exactly what the degrees of the angle are in a case like this. In addition the law is that in such a case even if the captain should make a mistake it is not a fault. The authorities have been cited. But the master made no mistake in *extremis* or otherwise.

Two local pilots were called, one by the claimant, Captain Allyn, and one by the County of Multnomah, Captain Pope. Their testimony is shown, and it seems clear to the claimant that their testimony supports every act of the master of the Yucatan in regard to his handling of the ship. The effort was made to cause Captain Pope to state that the mas-

ter of the Yucatan was in error. (Ap., p. 204.) Captain Pope says:

> "A. If the bridge was opening he had a perfect right to let go; if not, he had a right to hold on."

After a few more questions which the claimant thinks support the action of Captain Poulson in the matter the county's witness says finally (Ap., p. 206) in answer to a question of counsel:

> "A. Well, now, I was not there. I am only answering what I would do if there. I would probably let go at 120 degrees, taking chances on doing any damage, as Captain Poulson did."

Captain Allyn, witness for the claimant, on cross examination by the county was pressed to some extent with the idea that he would say 120 degrees was not a proper point at which to let go of the line, and as stated above, Captain Allyn refused to be bound by any absolute figure as to degrees. This was on cross examination; and on direct examination Captain Allyn testified that he had handled the Yucatan himself, and that the handling of the Yucatan by Captain Poulson in this particular instance was in a seamanlike and proper method. We refer to this because there is no iota of testimony supporting the allegation that Captain Poulson was incompetent. On the contrary, the evidence of the witness for the county and of the witness for the claimant is that the Yucatan was properly handled. On cross examination again the district attorney asks Captain Allyn:

"Q. Was it proper for him to have been handling that vessel without a river pilot on board?

A. Yes, anybody can handle their own vessel that wants to.

Q. Don't you know that the law requires him to have a pilot on board?

A. I don't know anything about that.

Q. Why do they have you men employed, the Willamette River pilots, if it is proper for a captain who hasn't a license to handle the vessel?

A. Well, it relieves the master of the vessel."

The facts are that when a local pilot is taken on a steamer the captain of the steamer handles the ship at the dock. Captain Allyn says (Ap., p. 160):

"A. The rule has been the captain takes her away from the wharf and then the pilot takes charge as soon as clear of the wharf.

Q. I mean as a matter of fact the captains who know the harbor handle their own ships, and the call for the local pilots is from strangers who don't know the harbor?

A. Yes, sir, that is the general rule."

We submit that from the questions and answers to Captain Pope and Captain Allyn the view of the Willamette River pilots in regard to Captain Poulson is made clear. He was considered perfectly able to handle the ship in this port. He could have obtained a pilot if he had wanted to without charge (Ap., p. 137), and it is true he should have had his license endorsed. It was endorsed immediately after the accident. He is thirty-five years of age,

has been a master mariner for eleven years and at sea nine years before that, is now master of the Yucatan, previous to that was master of the Elder, running into the same port, and before that of sailing ships. He holds an unlimited master's license for steam and sailing vessels and a local license for the Columbia River bar as far as Astoria, San Francisco, San Pedro and San Diego. (Ap., pp. 118, 119.)

The captain blew a signal for the bridge, it did not open; he blew another signal for the bridge, it did not open, and realizing that in the narrow space between the bridges, where the river is only 600 feet wide prompt action must be taken, he blew the danger signal.

At this time, according to Captain Blair, there was a current of 1.88 knots, which was discovered by throwing a box from the bow of the Boston; timeing it with a stop watch, the interval of the passing of the box was noted and the current figured out. These figures are not criticised, and this is the testimony as to the current.

The wind was about fifteen miles an hour (testimony of Captain Poulson, page 144) and was from the southeast. This testimony is not criticised and stands as the testimony as to the wind and its direction. Also on page 125 Captain Poulson testifies in the same way. In offering the evidence of the monthly meteorological report to show the height of the river to refute the testimony of the witness Gavin that the river was dead low, as he testified on page 76, it appears that the statement was made

by counsel that the wind was northwest. This, however, is apparently a typographical error.

All this time the operator of the bridge, incompetent and not able to take the responsibilities he was endeavoring to assume, was asking the gateman on the bridge what to do. This is a very strong statement, but we submit that it is borne out by his own testimony and by the fact that no excuse whatever is given of the failure of the bridge to open. The foreman's name was Smith, and this testimony is found in his cross examination on pages 183 to 188. Smith says the danger signal was given before he commenced to open the bridge. (Ap., p. 184.)

> "Q. Was the danger signal given before or after you commenced to open the bridge?
> A. Oh, certainly before.
> Q. Given before?
> A. Yes."

We presume it is not necessary to reinforce the claim that the danger signal was blown before the bridge began to open, as this is the testimony of the foreman of the bridge. If any question should be made of it there is the additional testimony of Mr. Wright (Ap., p. 149), who was on the Ainsworth dock immediately across the river, and who looked from his office when the danger signal was blown and the bridge was not open. Likewise Captain Chase, a river man and captain of the steamer Cascades (Ap., p. 153), heard the danger whistle, and the bridge was not open when he looked at it after the danger signal.

Now, the bridge did not open for fourteen minutes according to the admission of the County of Multnomah in its answer. Mr. Smith, the foreman, refused to testify as to the time it opened after the signal was given, and he said "he made his statement, making it one minute longer than what the log in the ship testified to." (Ap., p. 184.) The log is not in evidence, but if the witness meant the allegation in the cross libel he would mean then twenty minutes. However, the answer admits fourteen minutes, and it does not seem important to the claimant whether it was fourteen minutes or twenty minutes if the lack of time, whatever it was, caused the damage, and this we think is shown beyond question, because *the bridge did not open until after the danger signal, and as soon as the bridge began to lift before it was open* the captain put on full steam ahead and threw the stern of the Yucatan to port so that her starboard quarter might clear the gun projecting from the Boston.

Now the time necessary to open the bridge is about one minute after they start, as testified by Hicks, the foreman who succeeded Smith, Smith having been discharged after this accident. (Ap., p. 164.) Likewise Smith says (Ap., p. 185) that the draw opens in about a minute. It is a lift draw.

The County of Multnomah in its answer pleaded that the bridge had to be cleared, and there were conditions making it impossible to open the bridge. This, however, is entirely done away with by Mr. Smith (Ap., p. 181), who says, in answer to a ques-

tion from the county, that there was nothing unusual on the bridge, and in fact that there was less traffic at the noon hour than at any other time. In answer to a question he says:

"A. The traffic is not so heavy, no, sir."

Mr. Hicks, the present foreman of the bridge, says that at any time, the longest time and when crowded and at the heaviest traffic, it takes only two to three minutes to clear the bridge.

"A. Well, it will go from, oh, probably two or three minutes." (Testimony Hicks, p. 164.)

Therefore the statute and the regulations regarding the opening of the draw were broken without reason or excuse by the county. Under all of the facts and claims pleaded by the county the bridge could have been opened in from two to four minutes, and under their admission was not opened for fourteen minutes, in addition to which is the testimony of their foreman that it was not opened for one minute after the time shown by the log of the Yucatan.

We have said this took place because of the ignorance and incompetence of the bridge tender or foreman, Smith, and this we believe can be shown by the testimony.

Smith himself did not want to admit his ignorance or incompetence, which is excusable, but it is shown (Ap., p. 188) that he did not know how to put in a fuse, and that the bridge was once kept closed three-quarters of an hour while he telephoned to one of the gatemen to come and put in a fuse.

This likewise is brought out by the claimant from the testimony of the present foreman, Hicks. On pages 166-170 of the printed record can be found his admissions with regard to the competence of Smith. It is true the court below declared he did not see what it had to do with the case, but it has seemed to the claimant that it has a great deal to do with the case, and if there had been a competent bridge tender the bridge would have opened and there would have been no accident. In addition to this Smith gives no excuse or reason why the bridge did not open. Incidentally Smith testifies against the answer of Multnomah County in saying that the Yucatan was due west when he commenced to open the draw. Of course he has to swear to this or otherwise his testimony that the Yucatan was not ready for the draw would be ridiculous, but this is directly contrary to the allegation of the county's answer that the captain of the Yucatan waited too long to let go, because due west would be about 90 degrees off the dock. (Ap., 147 *et seq.*)

On page 186 of the printed record Smith explains why he did not open the bridge. He makes no excuse and no apology. It is a simple confession of incompetence. He heard the signal. He saw no boats in evidence anywhere, which in itself is a strange statement. He went down from his tower and crossed the bridge actually to the other side of the river along the south side of the bridge and he asked the gateman, and still he saw no boats in sight, yet here was the Yucatan swinging, besides which

the Yucatan is a sea-going vessel, and any one who cannot distinguish the whistle of such a boat from a river boat is in himself incompetent either through deafness or lack of intelligence. He saw then the Yucatan swinging and she gave the second signal, and even then he hesitated about opening the draw. (Ap., p. 186.) He hesitated because he thought the boat was not in position for the draw. He heard both signals and did not open it. Here again the county's allegations in its answer are refuted by their main witness. The county alleges in its answer that the Yucatan did not let go soon enough, and the county's employe, the bridge tender or foreman, claims that the Yucatan whistled too soon and was too ready for the draw and therefore he would not open it.

But as to the position of the Yucatan when she blew her whistle the first time for the bridge there is the testimony of Vineyard, page 107, as follows. He is a witness for the libelant and this is on direct examination.

> "By Mr. Beckwith: About what angle was she from her dock when she blew for the bridge the first time?
>
> A. The angle of about 30 degrees I imagine."

Vineyard was in the mess room when the whistle blew (p. 104), but he was looking at the Yucatan when she blew her second whistle.

> "Q. What angle was she when she blew the second signal?

A. About 100 or 110 degrees—120, somewhere in there, I cannot say exactly.

Q. About what angle was she when the danger signal was sounded?

A. In the neighborhood of 150 or 160 degrees, possibly more; I could not say precisely."

Yet Smith, the foreman of the bridge, says he did not know what boat was going through.

He says after she had blown the danger signal he opened the bridge. To any one having the responsibilities of the immense values of a ship on his hands this seems to be negligence and incompetence, and we therefore submit to the court that in our opinion the negligence of the county in the matter is clear. Another point adds to the evidence of Smith's incompetence. He did not know what the regulations were. He apparently had no idea of the responsibility of his position. (Ap., p. 188.)

"Q. Did you ever read the regulations?

A. No, sir.

Q. You don't know what they were?

A. No, sir."

Other witnesses on behalf of the county were T. C. Conners. He testified as to clearing the bridge (Ap., p. 191.)

"A. Well, I should judge at that time probably a minute and a half or two minutes, something like that, if I recall, maybe not so long."

He is not clear about the whistles, but says the danger signal, if it was blown, was because she was drifting on top of the Boston, and further:

"Q. Why should she drift on the Boston if the bridge was open?

A. That is what I want to know."

We submit there is nothing in the testimony of Conners to substantiate the answer of the county in any respect. It in no wise affects the competence of the master of the Yucatan or otherwise. It rather supports the view of the claimant.

A witness for the county is W. E. Reed, a gate tender on the bridge at the time of the accident. The interesting feature in his testimony is that he did not testify the way he had promised the district attorney he would testify. On page 202 of the printed record is shown the fact that a typewritten statement was obtained from him in the district attorney's office, but on his examination he diverged from this statement, and the county's proctor undertakes to show that Reed is confused and undertakes to impeach his own witness on page 201 by this statement. We submit that his testimony on the stand is more important than his statement in the office of the county, and that his evidence is not valuable for any purpose, for it is plainly erroneous from every standpoint. In the first place he says that the Yucatan went south and put her nose up against the steel bridge. (Ap., p. 197.)

"Mr. Evans: You don't mean the steel bridge?

A. Yes, put her nose up against the steel bridge."

Again (Ap., p. 198):

"A. She kept blowing the danger signal until she hit the Boston.

Q. Commenced when heading—

A. For the steel bridge.

Q. Which way would the boat be headed when headed towards the steel bridge?

A. South.

Q. Well, Mr. Reed, either I am confused or you are, one of the two. The steel bridge is the one the railroad goes over, the Harriman bridge?

A. Yes, sir."

This witness testifies that the Yucatan kept blowing the danger signal until she hit the Boston, and before that that she went south until she touched the steel bridge, which is indicated by the statement of the proctor for the county that the steel bridge is the bridge the railroad goes over and is the Harriman bridge, and it is shown on libelant's exhibit, page 2, the plat in the record, at the left edge of the plat and immediately up-river or south of the Globe Grain and Milling Company dock marked on the plat.

Another witness for the county was Mr. Holman, one of the county commissioners. This accident being a public matter, involving public service on the river, it was thought that the county would not hesitate to state all the facts and let the court decide the case. Nevertheless Mr. Holman, who testifies first that he is a manufacturing stationer (Ap., p. 209) and afterwards states on the same page that

he is county commissioner and admits the employment of men on the bridge, declined to testify as to the time his employee stated in his presence the time that elapsed after signal and before opening of draw.

As to the Boston.

The Boston is a naval training ship and was placed in her present location because of its accessibility to the members of the naval militia. The main damage on the Boston is for the loss of a piano. The State of Oregon brought the fact out in its testimony that it was convenient to the members to have the vessel in a position near the center of the city. This is the reason given for the location of the Boston. In fact, we call attention to the testimony of Harvey Beckwith, chairman of the naval board, on pages 58 and 60 of the record. The naval board paid no attention to the location of the Boston, according to the chairman of the naval board, "as there was plenty of room for half a dozen." We submit that this in itself shows negligence. The board paid no attention, gave no care to the location of the Boston as long as it was in position near the center of the city. In fact, we submit that it appears from the testimony in this cause that the naval board has been of the opinion that it could place the Boston wherever it pleased, regardless of the rights of navigation and commerce.

The river at this point is 600 feet wide, and the Yucatan was about 1300 feet from the Broadway bridge, which is the bridge in question. The Bos-

ton was lying in the fairway, and it is incumbent on her under the law to show that her position could not have caused the injury. Moreover, not only lying in the fairway in the narrowest part of the river between two bridges, the State of Oregon, through its naval board, insisted on pointing the guns ten feet out from the side of the ship. The Boston is 277½ feet long; its largest beam is 42.2 feet. (Ap., p. 46.) The beam does not include the guns as they extend out. The guns project in addition to the beam some eight feet. The Boston's port side lay westward from the east harbor line, that is to say, between the harbor lines and in the fairway 60 feet. (Ap., pp. 43, 115, 116, 72.)

We submit that this alone is negligence under the maritime law, and believe that the conditions surrounding the Boston, in the absence of any ordinance, make it negligence for her to lie in the position she did, and particularly to have the guns projecting. Her position can be seen from the different photographs introduced, claimant's Exhibits 1, 2, 3 and 4. From claimant's Exhibit No. 2 can be seen the distance the guns extend. From claimant's Exhibit No. 3 it can be seen that the guns are in a line with the center of the lift draw and the end of the Globe Milling Company dock. She was moved after the accident. The photographs were taken before she moved.

However, in addition to the care required by an anchored vessel in a narrow space there is an ordinance of the City of Portland, pleaded and admitted,

which requires the master or person having charge or command of any vessel coming to or lying alongside of any wharf, both before and during such time as such vessel is moored or stationed at such wharf or vessel berthed at such wharf, to have the anchor stowed, etc., and all other projections stowed within the rail of said vessel. The libelant no doubt will contend that the Boston is excepted from this ordinance because she is not made fast to any wharf, but we submit that the wording of this ordinance covers ships in the harbor, and under the words "coming to or lying alongside of any wharf" includes and covers the conditions under which the Boston was lying in the harbor. The ordinance says "shall both before and during such time as such vessel is moored" have all projections stowed within the rail of the vessel. We submit that both the wording and the spirit of this ordinance apply to the Boston. The same ordinance provides that vessels must not be moored within the fairway, and yet the Boston was moored in the fairway in the narrowest part of the river. As an answer to this the State of Oregon claims that it had specific permission to anchor in the fairway, to which the claimant replies that it is not aware that any such permission has been shown by the evidence. The claimant has been unable to find an iota of evidence authorizing the location of the Boston in the fairway. The plat in connection with libelant's Exhibit A shows the dolphin, but there is no permission to locate the Boston nor any other ship in the fairway. There is no permit

from the City of Portland for the Boston to lie in the fairway or for her to extend her guns from the sides, nor if such permit were given would it be constitutional. As the evidence shows, the Boston is moved from time to time, and a dolphin that is mentioned was torn out by the Boston. Moreover, under the libelant's exhibit referred to (page 212) it appears that no exclusive privilege is given, that it does not authorize any injury to private property or invasion of local law or regulations, that there shall be no unreasonable interference with navigation, and particularly under paragraph (e) on page 213 of the record that the permission is given for nothing but the particular object named, that is, the dolphin. The libelant takes issue with the State of Oregon that it has any permission or consent to place the Boston where the Boston lay on March 3, 1914, and that under any circumstances whatever permission it had does not authorize the invasion of any local law or regulation, and does not enable the Boston to break the local law and regulations of the city.

There is no evidence whatever that the city consented to the location of the Boston. There is no ordinance offered in evidence or pleaded authorizing the location of the Boston. The fact that the harbor master called at the Boston, the fact that he examined the boat or did this or that around the Boston is no consent. There is no authority given to show that any man named in the evidence had any right to offset the ordinance and regulations of the

City of Portland regarding the harbor. The harbor master was not called to the stand. The fact that the libelant did not call the harbor master shows no consent was given even verbally.

Attention is particularly called to the fact that the State of Oregon in alleging in its libel that it had permission to place the Boston between the harbor lines has made an error. The facts are that the naval board obtained permission to place one dolphin nine feet within or between the harbor lines. Another dolphin was placed further down the stream and outside of or eastward of the harbor line. This dolphin went out and the Boston was then placed as she lay when she was struck. This is shown by the testimony of Hilton on page 41 of the printed record.

Referring to the blue-print attached to libelant's Exhibit E-2, page 215 of the record, the witness says:

> "A. Towards the center of the stream from the harbor line. Then it shows also the other dolphin which was to be driven outside the harbor line, that is, between the harbor line and the shore line, and this—*at that time it was understood the Boston was to moor there*—and this is the permission as I filed it for the naval board.
>
> Q. That blue-print was attached to it at the time?
>
> A. Yes, it was made in quadruplicate and this was one of the copies."

It appears then from the testimony of the witness Hilton that the Boston was intended to lie and

did lie with her bow attached to the dolphin nine feet within or between the harbor lines and her stern fast to the dolphin outside or east of the harbor line. Later this dolphin went out, when the Boston swung out so that she was 60 feet in the channel. And in addition to this her beam is 42 feet. The distance the guns protrude can be seen from the testimony of the witness Hilton on pages 47 and 48 to be eight feet eight inches. Or if the sponson immediately forward of the gun should be considered as a protection for the gun, although not a part of the beam of the ship, then the gun would extend five feet beyond the extreme side of the Boston.

Moreover, the libelant stated through its proctor that no permission was being shown by the libelant to locate the Boston where she was located. On page 42 of the printed record appears the following:

> "Mr. Beckwith: We are merely offering to show he had permission to drive piling."

It is contended by the claimant that this has been shown, and no more has been shown than has been claimed by the statement of the proctor for the libelant in open court, to-wit, that only permission to drive the piling was shown, and it never was intended to leave the Boston in the fairway.

The Boston was moved after the accident. She was dropped down, as they call it, seventy or forty feet. (Ap., p. 74.)

As to the damage, an interesting feature in this cause is that not a dollar's worth of damage was done except by the gun on the Boston.

The gun crushed the piano, which was carelessly placed between an elbow or angle in the skin or iron side of the Boston and the heavy butt of the six-inch gun. When the gun swung on its trunnion, as it was intended to do and left to do, it crushed the piano against the skin of the Boston. If the piano had been even loose or had been in any other place on the ship it could not have been hurt; but it could not possibly escape if any river boat or any boat proceeding to the north and exerting any force could have touched the muzzle of that gun. The damage to the gun's shutters on the Boston was done by the gun. The damage to the canopy of the launch on the deck of the Boston was done by the gun. The cargo booms on the Yucatan were all fast, and the cargo boom in the stern of the Yucatan was held in place by tackle fast in bolts on the side of the Yucatan. The gun caught in one of these tackles or ropes, tore out the bolt, let the cargo boom fly, and the cargo boom or a hook on the end of the tackle caught in a stanchion on the canopy of the Yucatan and did whatever damage was done. If the gun had not been projecting the cargo boom could not have got loose.

The gun damaged the Yucatan. It entered the deadlight in the saloon or dining room of the Yucatan, slipped from there to another deadlight and from there to a third deadlight, cracked and tore the plates and scraped the side of the vessel for some distance. It was pleaded that to replace these plates will cost $1200. The evidence of Mr. Ore-

willer of the Portland Iron Works is that it would cost $3250.

Captain Blair of the naval militia says that it is against the custom to train these guns aft, although this was done for a while. There is nothing in the evidence to show that these guns could not have been moved or withdrawn so that they would not present an obstacle to navigation. There is no law nor regulation, according to Captain Blair's testimony, which requires the guns to be kept in the position in which they were.

The claimant submits:

1. That the proper signals for opening the bridge were given;

2. That no attention was paid to the signals and the bridge did not open;

3. That the danger signal was blown and the bridge did not begin to open until after the danger signal was given, after the signal for the bridge had been sounded twice;

4. That no excuse for the delay is shown and no sign or warning was given by the bridge that it would not open;

5. That this is a case of gross negligence on the part of the bridge and Multnomah county; and

6. That it was the delay which caused the contact between the Yucatan and the Boston;

7. That no damage whatever would have happened to the Boston or any property on board the Boston or the Yucatan if the gun on the Boston had not been projecting;

8. That there could have been no possible damage to the Boston or possibility of collision if the Boston had been out of the fairway at the narrowest part of the Portland harbor, to-wit, 600 feet;

9. That no negligence on the part of the Yucatan is pleaded excepting as to the angle at which she took in the line, which is not proven and which in any event is a matter of judgment in *extremis.*

The claimant therefore prays that a decree be entered against the County of Multnomah and the State of Oregon in favor of the Yucatan for twelve hundred dollars ($1200) and interest to cover its loss.

SANDERSON REED and

C. A. BELL,

Proctors for Claimant.